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No. 77-1372

In the Supreme Court of the United States

OCTOBER TERM, 1977

INTERSTATE MOTOR FREIGHT SYSTEM, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20543.

MARK L. EVANS,
General Counsel,

KENNETH G. CAPLAN,
Deputy Associate General Counsel,

ALAN J. THIEMANN,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

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On January 15, 1973 petitioner, a common carrier, sought permission from the Interstate Commerce Commission to convert a portion of its existing irregular-route operating authority in Arkansas, Missouri, and Oklahoma to regular-route authority[1] (Pet. App. A-10). After a hearing, the Commission denied the application on the basis of the Administrative Law Judge's findings that petitioner had deliberately used its irregular-route

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[1]Regular-route authority permits operations between specific points over specific routes. Irregular-route permits operations between all points within a territory, generally over unspecified routes. See 49 U.S.C. 303(a)(14), 308(a). See also *Transportation Activities, Brady Transfer & Storage Co.*, 47 M.C.C. 23, affirmed *sub nom. Brady Transfer & Storage Co.* v. *United States*, 80 F. Supp. 110, 116 (S.D. Iowa), affirmed *per curiam*, 335 U.S. 875.

authority to perform regular-route service by unlawfully encouraging and promoting operations that it could not legally perform (Pet. App. A-7, A-37 to A-44).

The court of appeals affirmed (Pet. App. A-1 to A-4). It concluded that "deliberate or intentional transformation [of irregular-route authority into regular-route operation] is an established ground for denial of a conversion application" and that "the Commission could properly infer from the facts of this case that [petitioner] deliberately or intentionally transformed the service in question into regular route operations" (Pet. App. A-4).

The decision of the court of appeals is correct, and further review is not warranted.

There is no basis for petitioner's claim (Pet. 7) that the Commission's decision was an unexplained departure from established Commission policy of "granting applications of the type denied."[2] As the court of appeals correctly determined, the Commission has long recognized and enforced the distinction between regular and irregular route authority and "has consistently stated that it will not sanction conversion from irregular to regular route authority where the character of the service has been intentionally transformed by the carrier" (Pet. App. A-3 and n. 2).[3]

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[2]Petitioner relied in the court of appeals on *Hart Motor Express, Inc.* v. *Midwest Motor Express, Inc.*, 92 M.C.C. 558, but the court of appeals found the case to be distinguishable (Pet. App. A-4 and n. 3). Petitioner does not now rely on *Hart* or on any other particular case for the proposition that the Commission has allowed other carriers identically situated to convert to regular route authority.

[3]Whether regular or irregular-route authority is more desirable to a carrier depends on that carrier's particular circumstances. Each type of authority has limitations and authorizations not applicable to the other. The Commission's decision to grant one type of authority rather than the other depends on its assessment of the public convenience and necessity. In ruling on an application to change the type of authority, it is clearly appropriate for the Commission to consider whether the carrier has deliberately by-passed the regulatory procedures by intentionally changing the character of its service from its authorized service to one that has not been authorized.

Petitioner also asserts that its actions were "unavoidable" rather than "deliberate" (Pet. 8). But the Administrative Law Judge thoroughly considered the circumstances surrounding petitioner's acquisition and operation of irregular-route authority (Pet. App. A-35 to A-40), and petitioner does not challenge any of the Judge's findings of fact.[4] Moreover, the court of appeals found that the record contains substantial evidence to support the Commission's finding that petitioner's transformation of the character of its service was deliberate (Pet. App. A-4), and petitioner has not shown that the court of appeals "misapprehended or grossly misapplied" the substantial evidence standard. *Mobil Oil Corp.* v. *Federal Power Commission*, 417 U.S. 283, 330.

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[4]As the Administrative Law Judge's decision indicates (Pet. App. A-37), one of the many criteria the Commission has used to distinguish regular from irregular-route service is the character of the cargo carried. Less-than-truckload (LTL) cargo is more characteristic of regular-route service, and active solicitation of such cargo by irregular-route carriers is one indication of deliberate conversion to regular-route service. Petitioner appears to admit (Pet. 7-8) that it deliberately solicited and developed such traffic, but erroneously claims that it did so at the Commission's encouragement. The fact that the Commission has required irregular-route carriers to have the capacity to handle LTL as well as truckload traffic—a capacity petitioner's predecessor lacked—could not reasonably have been viewed as abrogating the Commission's use of overall traffic characteristics as one index of the type of service rendered. See *Removal of Truckload Lot Restrictions*, 106 M.C.C. 455, 492, affirmed *sum nom. Regular Common Carrier Conference* v. *United States*, 307 F. Supp. 941 (D. D.C.) ("[This decision] would in no way relieve [irregular-route carriers] from maintaining their essential characteristics as irregular route carriers.") Moreover, the Commission relied on numerous other criteria in determining that petitioner had deliberately converted to regular service. See Pet. App. A-37 to A-42.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARK L. EVANS,
General Counsel,

KENNETH G. CAPLAN,
Deputy Associate General Counsel,

ALAN J. THIEMANN,
Attorney,
Interstate Commerce Commission.

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